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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

MAXIMILIAN KLEIN and SARAH GRABERT,
individually and on behalf of all other similarly
situated,

Plaintiffs,

v.

FACEBOOK, INC., a Delaware Corporation
headquartered in California,

Defendant.

Case No. 5:20-cv-08570-LHK

**JOINT CASE MANAGEMENT
STATEMENT**

Hearing Date: April 7, 2021
Time: 2:00 pm
Judge: Hon. Lucy Koh

Pursuant to Civil Local Rule 16-9, The Standing Order For All Judges Of The Northern District Of California, and the Scheduling Order entered by the Court, ECF No. 47, counsel for the proposed Consumer Class, the proposed Advertiser Class, and defendant Facebook, Inc. have met and conferred on certain issues and respectfully submit this Joint Case Management Statement in advance of the Initial Case Management Conference on April 7, 2021 at 2:00 p.m.

1. Jurisdiction and Service

This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal question jurisdiction), 1332 (class action diversity jurisdiction), and 1337(a) (antitrust); and under 15 U.S.C. §§ 15 and 26 (antitrust), as this action alleges violations of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2. This Court also has subject matter jurisdiction over the state law unjust enrichment claims presented in this action under 28 U.S.C. § 1367 (supplemental jurisdiction).

Facebook does not anticipate contesting subject matter jurisdiction, but reserves all objections pending review of the Consolidated Class Action Complaints (“CACs”) that plaintiffs intend to file. In addition, at the March 18 hearing, certain plaintiffs raised the issue of arbitrability of plaintiffs’ claims here; Facebook expects that it will assess that issue, and raise it with the Court as appropriate, once the CACs are filed and the scope of the cases is clearer. Plaintiffs would oppose any motion to compel arbitration.

Facebook does not contest personal jurisdiction or venue. Facebook has also been properly served in many of the underlying cases.

2. Facts

Plaintiffs’ Position:

Facebook has built one of the world’s most dominant monopolies through an extraordinary and unprecedented pattern of anticompetitive conduct. Facebook attempts to brush this case aside by claiming it is a free service that competes with everything from search engines to Netflix. But that posturing ignores the well-pleaded allegations in the complaints, and common sense.

Facebook provides its social networking services to consumers for non-cash consideration. But as Facebook’s co-founder has explained, “[Facebook] is not actually free We pay for Facebook with our data and our attention, and by either measure it doesn’t come cheap.” Chris Hughes, *It’s Time to Break Up Facebook*, NY Times, May 9, 2019, *available at* <https://kl.link/3dUTshC>. Facebook “spend[s] billions of dollars annually” developing features and content that it offers to consumers in exchange for their data and attention, *infra* at 5-6. And Facebook converts that data and attention into billions in profits by selling a unique form of digital advertising, which Facebook COO Sheryl Sandberg has described as “a third thing. We’re not TV, we’re not search. We are social advertising.” Complaint (Public Redacted Version), *FTC v. Facebook, Inc.*, No. 1:20-cv-3590-JEB, ECF No. 51 at ¶ 49 (D.D.C. Jan. 13, 2021). Standard Oil operated drilling platforms to extract crude oil and earned its revenue through the sale of refined petroleum. Facebook operates a digital platform that mines data and consumer attention and earns its revenue through the sale of social advertising. The consideration exchanged by this internet monopolist may be novel, but that does not render one of the world’s largest companies immune to fundamental antitrust principles. Facebook acquired and maintains monopoly power by undermining competition, not by building a better mousetrap, and Facebook users and advertisers both receive less value as a result. The Federal Trade Commission, 46 States, and a multi-year congressional investigation have all reached the same conclusion.

Consumer Class Plaintiffs’ Statement: Facebook has engaged in a two-part anticompetitive scheme to destroy competition and harm consumers. *First*, Facebook has consistently and intentionally deceived consumers about the data privacy protections it provides. Facebook promised consumers stringent privacy protections, and many consumers chose Facebook over other competing platforms as a result, allowing Facebook to unlawfully gain and maintain a dominant, monopoly position. In reality, Facebook deceived consumers about the amount of data that it harvested from consumers and made available to third parties. *Second*, Facebook surveilled consumers, tracking the websites and apps they visited, to identify upstart competitors that were gaining traction, to target them for acquisition or destruction. Facebook

1 made clear that it would copy competitors’ innovations and discriminatorily block their access to
2 Facebook’s platform and valuable consumer data if they did not sell their businesses to
3 Facebook. Facebook’s highly successful “acquire, copy, or kill” scheme has substantially
4 lessened, if not eliminated, competition.

5 Although Facebook attempts to rewrite plaintiffs’ complaints by claiming the only
6 conduct at issue occurred long ago, the Consumer Class Plaintiffs have alleged in detail how
7 Facebook’s anticompetitive conduct continued well past 2018, and indeed continues today. *E.g.*,
8 *Klein Compl.* ¶¶ 128–139 (explaining how Facebook secretly allowed third parties to access user
9 data without consent, in violation of the 2012 FTC consent order, until after the Cambridge
10 Analytica scandal brought its conduct to light in March 2018); *Id.* ¶ 199 (describing Apple’s
11 discovery in August 2018 that Facebook was using Onavo to secretly monitor consumers); *Id.* ¶
12 188 (describing anticompetitive acquisition of Giphy in 2020).

13 Facebook’s destruction of competition through its two-part scheme has caused consumers
14 to suffer substantial economic injury. Consumers give up valuable consideration—their personal
15 information and their attention—in using Facebook pursuant to Facebook’s Terms of Service.
16 Facebook in turn sells consumer data to advertisers in exchange for money. Absent Facebook’s
17 anticompetitive conduct, competition would have required Facebook to provide consumers
18 greater value in return for their data, which Facebook took without providing adequate
19 compensation. Through its deception of consumers and the acquisitions enabled by its
20 deception, Facebook prevented competition, and as a result, consumers received less value for
21 their data than they otherwise would have.

22 Advertiser Class Plaintiffs’ Statement: The Advertiser Class Plaintiffs allege that, among
23 other things, Facebook’s false promises of stringent privacy protections allowed it to unlawfully
24 acquire a dominant, monopoly position in the social advertising market and that Facebook
25 maintained and expanded that monopoly by engaging in an anticompetitive scheme to eliminate
26 and prevent competition in the social advertising market, causing substantial economic injury to
27 the proposed advertiser class in the form of inflated prices for Facebook’s advertising services.
28

1 The Advertiser Class Plaintiffs allege, in detail, that Facebook actively concealed its
2 anticompetitive scheme for years, and it remained concealed until NBC News made internal
3 Facebook documents public in November 2019. *Affiliious* Compl. ¶¶ 371-409.

4 Potential challenges to Facebook’s dominance in the social advertising market arose with
5 the prevalence of touch-controlled smart phones. Mobile applications were providing similar
6 functionality to Facebook’s desktop application, including messaging and image sharing, and
7 were generating user content and engagement with the mobile applications’ platforms. While it
8 was clear that the digital future was moving toward mobile platforms, Facebook was behind the
9 curve with a mobile product and, consequently, was losing traction with users. Facebook
10 understood that reduced engagement on its core product (the Facebook desktop web app) would,
11 in turn, reduce the demand for Facebook’s targeted social advertising. That is when, according
12 to internal Facebook documents, Facebook devised a plan to prevent developers from building
13 mobile applications that could become rival social networks and competitors in the social
14 advertising market.

15 Tens of thousands of applications relied on Facebook’s developer platform (called
16 “Platform”) to access Facebook’s social data through application programming interfaces
17 (“APIs”). Facebook performed a detailed audit of mobile applications to identify current and
18 potential competitors and neutralized those competitive threats by revoking access to core APIs
19 that, among other things, allowed apps to query a user’s friends to find other users who might be
20 interested in using the app. For a select group of hand-picked developers, Facebook allowed
21 continuing access to core APIs through data sharing agreements. Meanwhile, apps that did not
22 rely on the Facebook’s Platform, including Instagram and WhatsApp, were building their own
23 competing social networks organically. Facebook’s withdrawal of its core APIs would have no
24 effect on those competitors. Therefore, Facebook acquired those competitors, including
25 Instagram and WhatsApp, which could potentially rival Facebook as a source of social user data
26 and compete in the social advertising market. Facebook’s acquisitions decreased competition
27 and increased Facebook’s share of the social advertising market. Contrary to Facebook’s
28

1 assertions, *infra* at 5, this is not a mere “refusal to deal” case; rather, the Advertiser Class
 2 Plaintiffs allege that Facebook’s removal of Platform functionality was one part of a larger
 3 scheme to exclude rivals and to monopolize the relevant markets, and further, that there was no
 4 legitimate business or technical justification for that conduct. *Affiliious* Compl. ¶¶ 117-128, 169-
 5 187.

6 The Advertiser Class Plaintiffs allege that Facebook’s anticompetitive conduct eliminated
 7 and prevented competition in the social advertising market, allowing Facebook, unrestrained by
 8 competition, to continually hike its advertising prices during the class period to supracompetitive
 9 levels.

10 **Defendant’s Position:**

11 This is an extraordinary and unprecedented antitrust case. Antitrust law exists to protect
 12 competition, with the express understanding that competition will ensure fair prices and
 13 maximize output. Facebook is free to users and is offered in unlimited supply. Thus, the users
 14 have no compensable theory of antitrust harm. The users also do not even claim Facebook
 15 engaged in any anticompetitive conduct, instead attacking Facebook’s “mousetrap” for not living
 16 up to their (unspecified) standards. Perhaps that is why the users in their statement muster a
 17 stronger argument for a case against Standard Oil than they do Facebook. For advertisers,
 18 Facebook is just one of many options in the market—social or otherwise—part of a flourishing
 19 competitive arena where advertisers have their pick of countless ways to reach consumers. The
 20 advertiser plaintiffs in this case attack Facebook because it is one of the more attractive places to
 21 advertise. That too is not an antitrust claim. Indeed, the advertisers’ theory, advanced by the
 22 same counsel for plaintiffs here in a similar case, has already been rejected by Judge Freeman on
 23 every conceivable dimension, including its “refusal to deal” theory and on statute of limitations
 24 grounds. *Reveal Chat Holdco, LLC v. Facebook, Inc.*, 471 F. Supp.3d 981 (N.D. Cal. 2020).

25 Since its founding in a college dorm room in 2004, Facebook has offered a higher-quality
 26 user experience than its competitors and has continued to improve that experience through
 27 constant innovation and investment. Today, Facebook competes to keep users engaged by
 28

1 constantly innovating and adding new features—spending billions of dollars annually on
2 research and development. Facebook operates a portfolio of products that helps users engage,
3 connect, share, and consume different content, including personal updates, interests, photos,
4 news, videos, and other content. Facebook’s services are free to its users and offered in
5 unlimited quantity. Facebook generates substantially all of its revenue by selling advertising.

6 Users and advertisers alike have countless options to which to devote their attention and
7 advertising dollars, respectively—a reality that plaintiffs ignore in their artificially narrow
8 market definitions. Those options expand by the day, with new entrants like TikTok, Clubhouse,
9 and Disney+ recently emerging, and established competitors like YouTube, Apple’s iMessage,
10 Tencent, Google, Snapchat, Twitter, Spotify, Netflix, Hulu, LinkedIn, and Strava all allowing
11 users to engage, connect, share, and consume different content. As the Federal Trade
12 Commission acknowledges, the “most significant competitive threats” Facebook faces are not
13 “clones of Facebook,” but “differentiated products that offer users a distinctive way of
14 interacting.” Compl. (“FTC Compl.”) ¶ 69, *FTC v. Facebook, Inc.*, No. 1:20-cv-3590-JEB
15 (hereinafter “FTC Case”), ECF No. 6 (D.D.C. Dec. 9, 2020). Advertisers have even more
16 options, including traditional and streaming television and movies, and even print. Every
17 website on the internet is a competitor for advertising dollars. And as the Court knows, even
18 when one focuses only on digital advertising, Facebook faces a massive competitor: Google.
19 March 18 Hr’g Tr. at 17:1-3 (The Court: “Facebook and Google are perhaps the biggest ad
20 revenue competitors in the world.”). Google’s presence alone precludes any suggestion that
21 Facebook is a monopolist.

22 Given the broad range of competitors to Facebook’s free products, it is little surprise that
23 plaintiffs’ complaints fail to articulate any traditional antitrust theory. Instead, plaintiffs’
24 complaints require reconstructing the now-distant past to identify a hypothetical alternate reality
25 in which the competitive landscape looks different. In doing so, the complaints ignore
26 Facebook’s history of innovation and competition on the merits, trading reality for a contrived
27 and flawed narrative construct. That narrative—lifted from an article and a complaint dismissed
28

1 by another court in this district last year—seeks to tie Facebook’s success to representations it
2 made about its privacy policy nearly two decades ago. In this counterfactual world, widely
3 known practices—successes and missteps alike—are alleged to be part of a hidden scheme to
4 drive away competition. According to plaintiffs, this supposed scheme went unnoticed, despite
5 Facebook being one of the most scrutinized companies in the world for almost two decades, until
6 it was too late. None of it is true. The facts are that Facebook is successful due to constant
7 innovation, investment, research, and product and technology improvements.

8 Indeed, what plaintiffs attack is competition and innovation. For example, beginning in
9 2007, Facebook allowed application developers to integrate their products with Facebook by,
10 among other things, providing access to various “Application Programming Interfaces” or
11 “APIs”—expanding the range of services users could access through the Facebook platform.
12 When Facebook announced changes to that policy, the most recent of which at issue in these
13 cases was announced in 2014, *see, e.g., Affiliious* Compl. ¶ 207, it acted pursuant to legitimate
14 business justifications.

15 Belying any claim of monopoly status, Facebook has continuously sought to add features
16 and services for its users. To enhance its capabilities in photo-sharing, in 2012 Facebook
17 acquired a then-fledgling start up with 13 employees called Instagram. And to expand its reach
18 into international markets and provide users with enhanced messaging capabilities, it acquired
19 WhatsApp in 2014. Both high-profile acquisitions were reported to and reviewed by the FTC,
20 and neither was challenged by the United States Department of Justice, the FTC (which cleared
21 both transactions), the Attorneys General of any of the 50 states or the District of Columbia, or
22 any private plaintiff. And for good reason. Neither transaction even arguably lessened
23 competition at the time, and in the years since the acquisitions, Facebook has invested billions of
24 dollars in both apps, helped both services innovate and dramatically expand their user bases, and
25 driven enhanced competition in photo- and video-sharing and online messaging (particularly
26 against SMS products offered by wireless companies), all of which has redounded to the benefit
27
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1 of consumers. And, again, Facebook has offered all of these services to users *for free* and in
2 *unlimited quantity*.

3 Facebook being free has not deterred the user plaintiffs from pursuing claims for
4 damages. The user plaintiffs claim that, had Facebook faced *even more* competition, Facebook
5 would have provided them with “compensation” in exchange for their “information and
6 attention” given to the use of Facebook’s free services. *E.g., Klein* Compl. ¶ 234. In other
7 words, plaintiffs seek to be paid for using Facebook for free over the last 14 years. By the same
8 token, the advertiser plaintiffs complain that they overpaid for advertising on Facebook, while
9 failing to allege the price they claim that they should have paid, or explaining how Facebook
10 possibly engaged in monopoly pricing for advertising given the incredibly large number of
11 advertising outlets that exist in the market. Offering consumers an attractive product and
12 charging commensurate with product quality and value is not an antitrust violation.

13 Whatever the merits of plaintiffs’ theories, it is beyond dispute that the challenged
14 anticompetitive conduct occurred long ago. Plaintiffs nowhere explain why they delayed so long
15 to bring their stale claims and plaintiffs’ counsel has already told the court that they were waiting
16 until the “time was right.” It is to thwart just that kind of strategic behavior that statutes of
17 limitations exist in the first place. One complaint meekly claims that the plaintiffs could not
18 have discovered any of Facebook’s privacy practices because its publicly disclosed, three-
19 paragraph privacy policy was too complicated to understand until “investigative journalists . . .
20 discover[ed] and explain[ed]” it. *Klein* Compl. ¶ 209. But that explanation was published no
21 later than 2008. Others point to Facebook’s generalized statements about its commitment to user
22 privacy. But the complaints also describe supposed “public outrage and litigation” that ensued
23 following conduct that occurred in 2007. *Id.* ¶ 110; *Kupcho* Compl. ¶ 111. The plaintiffs also
24 claim that a publicly disclosed settlement with the FTC addressing much of the conduct
25 challenged in the complaints purportedly engendered widespread consumer reliance *in 2012*.
26 *Klein* Compl. ¶ 139; *Kupcho* Compl. ¶ 140. Of course, plaintiffs cannot claim that they relied on
27 something while at the same time claiming that it was concealed from them. In actual fact,
28

Facebook has a long track record of transparency with respect to its use of user data, belying any contention that the challenged practices were concealed—let alone fraudulently so.

At bottom, plaintiffs’ claims are premised on theories well beyond the outer boundaries of the antitrust laws: that a firm’s statements about its own products can inhibit competition on the merits; that the acquisition and attempted acquisition of firms with no viable path to, or even plans to, compete in the alleged relevant markets can somehow reduce competition in those markets; that Facebook had a duty to aid a laundry list of tens of thousands of its putative competitors by providing perpetual and unconditioned free access to user data via its Platform APIs; and that plaintiffs can recover monetary damages from their use of a free product.

3. Legal Issues

Plaintiffs’ Position:

Consumer Class Plaintiffs’ Statement:

- Whether Facebook has unlawfully acquired and maintained monopoly power in the relevant markets, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2;
- Whether Facebook has unlawfully attempted to monopolize the relevant markets, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2;
- Whether Facebook has been unjustly enriched by its alleged misconduct; and
- Whether a class should be certified under Federal Rule of Civil Procedure 23.

Advertiser Class Plaintiffs’ Statement:

- Whether Facebook has unlawfully acquired and maintained monopoly power in the relevant markets, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2;
- Whether Facebook has unlawfully attempted to monopolize the relevant markets, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2; and
- Whether a class should be certified under Federal Rule of Civil Procedure 23.

Defendant’s Position:

Because consolidated complaints have yet to be filed, Facebook is not yet able to identify all of the principal legal issues raised by plaintiffs. At the March 18 hearing, the Court ordered a

claim-selection process and suggested that the parties and the Court address the selection of each side's claims at the upcoming Case Management Conference. Plaintiffs have not advised Facebook what claims they intend to plead in their CACs or what their top five claims will be.

Based on its review of the complaints filed against it to date, Facebook identifies at least the following legal issues that are likely to be in dispute:

1. Whether individuals may recover monetary damages under the antitrust laws for their use of a free product.
2. Whether plaintiffs' allegations are sufficient to state a claim against Facebook under Rule 12(b)(6) of the Federal Rules of Civil Procedure.
3. Whether plaintiffs' claims are timely given the four-year limitations period in 15 U.S.C. § 15b.
4. Whether the doctrine of laches bars plaintiffs' claims for injunctive relief.
5. Whether Facebook caused antitrust injury to the plaintiffs and putative class members and, if so, which plaintiffs and class members.
6. Whether plaintiffs can satisfy the prerequisites of both Fed. R. Civ. P. 23(a), 23(b)(2), and 23(b)(3).
7. Whether members of the putative "user" class relied upon Facebook's privacy representations in deciding to become and/or stay Facebook users.
8. Whether and to what extent members of the putative "user" class place a cognizable monetary value on their personal data, time, and information.
9. Whether alleged deceptive conduct is cognizable under Section 2 of the Sherman Act when the alleged statements are about the defendant's own product.
10. Whether Facebook's acquisitions of companies that were not competitors—or at best only one of several similarly positioned nascent or potential competitors—at the time of the acquisitions is unlawful "exclusionary conduct."
11. Whether Facebook has a duty to deal within the meaning of *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398

(2004) with developers who designed applications that interfaced with Facebook’s Platform.

12. Whether vertical agreements to share data that do not foreclose competition can be unlawful “exclusionary conduct.”

13. Whether allegedly copying a putative rival’s product features is unlawful “exclusionary conduct,” or is instead competition on the merits.

14. Whether a relevant antitrust market limited to “social” advertising is plausible.

15. Whether plaintiffs have plausibly defined the contours of their alleged relevant markets.

16. Whether plaintiffs have plausibly alleged that Facebook has monopoly power in a relevant market.

17. Whether plaintiffs can meet their burden of showing that the challenged conduct did not constitute competition on the merits.

18. Whether plaintiffs can overcome the strong presumption that commercial speech or advertising has a de minimis effect on competition.

19. Whether plaintiffs can meet their burden of proving that Facebook had a specific intent to control prices when it offers a completely free product to consumers.

4. Motions

There are no pending motions.

Motions to Relate: Parties have moved to relate the following cases to this action, which the Court has granted—

- *Sherman v. Facebook*, No. 20-CV-08721-JSW (N.D. Cal. filed Dec. 9, 2020)
- *Kupcho v. Facebook, Inc.*, No. 20-CV-08815-JSW (N.D. Cal. filed Dec. 11, 2020)
- *Dames et al. v. Facebook, Inc.*, No. 20-cv-08817-HSG (N.D. Cal. filed Dec. 11, 2020)
- *Steinberg v. Facebook, Inc.*, 20-CV-09130-VC (N.D. Cal. filed Dec. 17, 2020)
- *Affilious, Inc. et al. v. Facebook, Inc.*, No. 20-CV-09217-EMC (N.D. Cal. filed Dec. 18, 2020)

- 1 • *Layser v. Facebook, Inc.*, No. 21-CV-00337-VC (N.D. Cal. filed Jan. 13, 2021)
- 2 • *Garvin v. Facebook, Inc.*, No. 21-CV-00618-KAW (N.D. Cal. filed Jan. 26, 2021)
- 3 • *Rosenman v. Facebook, Inc.*, No. 21-CV-00336-VC (N.D. Cal. filed Feb. 5, 2021)¹
- 4 • *Kovacevich v. Facebook, Inc.*, No. 21-CV-01117-JCS (N.D. Cal. filed Feb. 15, 2021)
- 5 • *Mark K. Wasvary, P.C. v. Facebook, Inc.*, No. 21-CV-001518-SK (N.D. Cal. filed March
- 6 3, 2021)

7 Facebook anticipates moving to relate *Ryan v. Facebook, Inc.*, No. 21-cv-2017 (N.D. Cal.
8 filed Mar. 23, 2021), to this case as well.

9 ***Motion for Leave to Appear in Pro Hac Vice:*** Parties have moved for their respective
10 counsel to appear in pro hac vice. The Court has thus far granted all such motions.

11 ***Motions to Appoint Plaintiff's Counsel:*** The Court has considered applications to serve
12 as interim class counsel and has appointed separate interim class counsel to represent the putative
13 Consumer Class and Advertiser Class.

14 ***Motion(s) to Dismiss:*** Facebook expects that it will move to dismiss pursuant to Fed. R.
15 Civ. P. 12(b)(6). The Court has set the deadline for this motion on May 20, 2021, twenty-eight
16 (28) days following the filing of plaintiffs' CACs.

17 ***Motion to Stay:*** In the event this Court denies Facebook's anticipated motion to dismiss
18 these cases and Judge Boasberg denies in whole or in part Facebook's pending motions to
19 dismiss two lawsuits filed by the FTC and State Attorneys General in the District Court for the
20 District of Columbia, *see* FTC Case, ECF No. 56; *New York v. Facebook, Inc.*, No. 1:20-cv-
21 03589-JEB (D.D.C.) (hereinafter "State AG Case") (together, the "government cases"), ECF No.
22 114, Facebook will likely move to stay this action in whole or in part pending resolution of the
23 government cases.

24 Facebook's position is that, given the substantial overlap in allegations, theories of harm,
25 and injunctive relief sought between the cases and the resulting risk of inconsistent judgments,

26
27 ¹ This case was voluntarily dismissed and re-filed in California state court. Facebook has
28 removed it and anticipates moving to relate the new case. *See Rosenman v. Facebook, Inc.*, No. 21-CV-2108 (N.D. Cal. removed March 25, 2021).

1 staying proceedings pending the government lawsuits will enhance efficiency for both parties
2 and the Court and distill which claims, if any, remain for adjudication.²

3 Plaintiffs would oppose any motion to stay this action pending resolution of the
4 government cases.

5 ***Motion to Compel Arbitration:*** At the March 18 hearing, certain plaintiffs raised the
6 issue of arbitrability of plaintiffs' claims here; Facebook expects that it will assess that issue, and
7 raise it with the Court as appropriate, once the CACs are filed and the scope of the cases is
8 clearer. Plaintiffs would oppose any motion to compel arbitration.

9 ***Motion for Class Certification:*** Plaintiffs anticipate filing motions for class certification.
10 Facebook anticipates opposing class certification.

11 ***Motion for Summary Judgment:*** In the event that this case survives any motion to
12 dismiss and a putative class is certified, Facebook anticipates moving for summary judgment
13 pursuant to Fed. R. Civ. P. 56.

14 The parties also anticipate that there will be further motions, including motions to
15 exclude expert testimony and motions in limine.

16 **5. Amendment of Pleadings**

17 Pursuant to the Court's March 18, 2021 Case Management Order (ECF No. 74), plaintiffs
18 will file CACs—one for the proposed Consumer Class and one for the proposed Advertiser
19 Class—no later than April 22, 2021.

20 **6. Evidence Preservation**

21 The parties certify that they have reviewed this Court's Guidelines Relating to the
22 Discovery of Electronically Stored Information. The parties are aware of their obligations, and
23 have taken reasonable steps to, preserve potentially relevant evidence. The parties will meet and
24 confer concerning ESI.

25 **7. Disclosures**

26
27 ² Plaintiffs' own counsel, in their filings regarding their motions to appoint interim lead
28 plaintiffs' counsel, recognized that the FTC and State Attorneys General "assert *virtually identical* theories of harm to competition." See ECF No. 62, at 8 n.5 (emphasis added).

1 The parties have not served initial disclosures.

2 **Plaintiffs' Statement:**

3 Plaintiffs propose that the parties serve the information required by Fed. R. Civ. P.
4 26(a)(1) by May 13, 2021. Facebook, like virtually every defendant in complex civil litigation,
5 claims it will eliminate or narrow the case against it through a motion to dismiss, and that
6 efficiency would be served by stopping the case in its tracks. Plaintiffs of course disagree. That
7 familiar dispute is no basis for failing to set a date for compliance with the modest requirements
8 of Fed. R. Civ. P. 26(a)(1). Moreover, although Facebook represents that "there remains the
9 need to coordinate with the government cases, where discovery has not yet commenced and is
10 awaiting the outcome of Facebook's motion to dismiss, pursuant to local rule," *infra* at 14, there
11 is nothing to prevent Facebook from pressing forward with the government cases expeditiously
12 during the pendency of its motion to dismiss in those cases. Plaintiffs understand and will
13 comply with their ongoing duty under Rule 26(e) to supplement their disclosures.

14 **Defendant's Statement:**

15 Facebook proposes that the exchange of initial disclosures occur fourteen (14) days after
16 a decision on Facebook's motion to dismiss the CACs, assuming the complaints are not
17 dismissed in their entirety and a stay is not sought pending resolution of the government cases.
18 As described below, it is likely that the scope of this case will be far narrower after the motion to
19 dismiss is decided, if it is not dismissed entirely. Plaintiffs attempt to cast Facebook's motion to
20 dismiss as standard fare, but the issues with their complaints are anything but ordinary. While
21 this Court will of course hear and resolve the motions to dismiss itself, Judge Freeman's ruling in
22 *Reveal Chat* confirms that, at a minimum, there are serious questions regarding threshold issues,
23 including timeliness and antitrust merits issues, that will be presented here that will
24 fundamentally shape whatever, if anything, remains of the case. And there remains the need to
25 coordinate with the government cases, where discovery has not yet commenced and is awaiting
26 the outcome of Facebook's motion to dismiss, pursuant to local rule. *See* Fed. R. Civ. P. 26(d)
27 (discovery cannot begin until Rule 26(f) conference); D.D.C. LCvR 16.3(b) (no Rule 26(f)

conference in cases where no answer has yet been filed).³ It is therefore most efficient for the parties to set a schedule that allows the parties to serve initial disclosures once the scope of contested issues in this case has been resolved at the motion-to-dismiss stage. Facebook understands and will comply with its ongoing duty under Rule 26(e) to supplement its disclosures after initial disclosures take place.

8. Discovery

The parties have not taken any discovery to date. The parties will discuss Stipulated Electronically Stored Information (ESI) and Protective [Proposed] Orders and will endeavor to make joint proposals to the Court to be entered in this action.

The parties' respective proposals regarding the timing of discovery are set forth in Section 17 (Proposed Case Schedule) below.

Plaintiffs' Position On Section 8 - Discovery:

A. Timing of Discovery Commencement

Consumer and Advertiser Class Plaintiffs' Statement: Plaintiffs believe discovery should begin immediately with Facebook's production of documents that Facebook previously produced to government entities. Plaintiffs request that Facebook immediately produce the documents (and associated privilege logs) it provided to, and its correspondence with, any government entity—including the FTC, State Attorneys General, the United States House of Representatives, the United Kingdom's House of Commons, the German Federal Cartel Office (Bundeskartellamt), and the Australian Competition & Consumer Commission—in connection with their investigation and/or litigation of Facebook's conduct at issue in this case. Such production will be neither burdensome nor costly, as it requires little more than making a copy of the productions previously made. Producing these documents now will avoid unnecessary delay in conducting discovery and may assist Plaintiffs in tailoring their follow-on discovery efforts. Plaintiffs request that the documents described above—with the exception of any third-party

³ Facebook timely filed its Motion to Dismiss those cases. It is unclear what the plaintiffs are referring to when they suggest that Facebook should proceed "expeditiously."

documents for which production requires notice to such third parties—be provided to Plaintiffs by Facebook no later than two business days after the entry of the Protective Order. Any third-party documents covered by Facebook’s confidentiality obligations to such third parties should be produced promptly following the completion of the notice and objection process that will be outlined in the Protective Order.⁴

Plaintiffs further request that Facebook produce unsealed versions of the sealed filings in the FTC Case and the State AG Case, no later than two business days after the entry of the Protective Order. Plaintiffs also request that Facebook produce unsealed versions of the sealed filings, as well as Facebook’s document productions, discovery responses, deposition transcripts and exhibits, and expert reports, in the following cases, no later than two business days after the entry of the Protective Order: *Six4Three LLC v. Facebook, Inc.*, No. CIV53328 (San Mateo County Super. Ct.); *Social Ranger LLC v. Facebook, Inc.*, No. 1:14-CV-01525 (D. Del.); *In re Facebook, Inc. Consumer Privacy User Profile Litigation*, No. 3:18-MD-02843 (N.D. Cal.); *Williams et al v. Facebook, Inc. et al*, No. 3:18-CV-03676 (N.D. Cal.); *Lane et al v. Facebook, Inc. et al*, No. 5:08-CV-03845 (N.D. Cal.); and *In re Facebook Internet Tracking Litigation*, No. 5:12-MD-02314 (N.D. Cal.). To the extent any third-party information in these documents is covered by Facebook’s confidentiality obligations to such third-parties, this information should

⁴ To the extent Facebook suggests that Judge Chhabria’s order in *In re Facebook, Inc. Consumer Privacy Litigation* cuts against Plaintiffs’ position, that suggestion is inaccurate. In that case, Judge Chhabria in fact ordered Facebook to produce materials provided in response to government investigations notwithstanding Facebook’s assertions that the materials would be overbroad; the language quoted by Facebook simply reflects that Judge Chhabria granted Facebook’s request for additional time to conduct a further review. See Tr. of Proceedings at 8:12-15, *In re Facebook, Inc. Consumer Privacy Litig* No. 18-md-2843-VC (N.D. Cal. Jan. 8, 2020) (“I don’t think it is important for you to get the pre-2012 stuff on an expedited stuff [sic]. I also don’t see an any reason you shouldn’t get the 2012 -- pre-2012 stuff. I understand there is a lower likelihood that that stuff will be relevant or lead to the -- lead to the discovery of material that is relevant now, but it’s -- there seems like enough of a possibility that it is worth ordering them to provide it, and it is not burdensome enough to be worried about it too much. So I’m going to order Facebook to provide the pre-2012 stuff too, but I don’t think it needs to be on an expedited basis.”).

1 be provided promptly following the completion of a notice and objection process that will be
2 outlined in the Protective Order.

3 Plaintiffs propose that a Rule 26(f) conference will be held on April 29, 2021. However,
4 Plaintiffs believe that production of the documents described above will be helpful in focusing
5 both the Rule 26(f) conference and subsequent discovery efforts.

6 Plaintiffs intend to serve requests for the production of documents prior to the Rule 26(f)
7 conference seeking the documents outlined above in order to make the conference more
8 productive, and will serve other written discovery after the Rule 26(f) conference. Plaintiffs will
9 agree to forego early discovery under FRCP 34 if Facebook agrees to make a substantial
10 production of documents responsive to Plaintiffs' document requests and serve substantive
11 interrogatory responses on the day its responses to the document requests become due (30 days
12 after the Rule 26(f) conference).

13 In an effort to target discovery, Plaintiffs asked Facebook to provide them with just the
14 document requests issued by governmental entities (and not Facebook's responses). After
15 reviewing those requests, Plaintiffs would work to further target their initial discovery by seeking
16 responses to the most relevant requests. However, Facebook has refused to provide even the
17 document requests it received from governmental entities.

18 Facebook has further taken the position that discovery should be stayed entirely because
19 it expects to narrow or eliminate this case through a motion to dismiss. Facebook acknowledges
20 that this Court does not typically stay discovery pending a motion to dismiss in antitrust cases,
21 *infra* at 23, but claims this case is exceptional for two reasons. First, Facebook assures the
22 Court that it is likely to win on its motion to dismiss. Second, Facebook claims the
23 governmental actions against it should be allowed to reach final judgment before Facebook has
24 to spend time defending against this case.

25 Facebook's lengthy arguments for staying discovery should be made and addressed in a
26 motion to stay discovery. Plaintiffs will not brief that motion here, but note only briefly that
27 both of Facebook's reasons for delay lack merit. First, Facebook's claim that it will prevail on a
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1 motion to dismiss is neither exceptional nor accurate. If discovery were stayed every time a
2 defendant claimed it would eliminate or narrow a complex civil case with a motion to dismiss,
3 stays of discovery would become the norm rather than the rare exception. Moreover, Facebook's
4 arguments rely on grave distortions of Plaintiffs' legal theories. Second, Facebook's attempt to
5 parlay the government actions into a stay of discovery falls apart when examined. If the
6 government actions overcome a motion to dismiss and are litigated to final judgment, as
7 Facebook appears to anticipate, *see infra* at 25 (referring to final judgments in the government
8 actions), Facebook will have to participate in extensive discovery. It would make no sense to
9 stay this case, which raises claims for additional relief not sought in the government cases, while
10 the government cases are litigated at length in an uncoordinated fashion. Indeed, Facebook has
11 claimed it prefers that discovery in this case be coordinated with the FTC and State cases. But
12 Plaintiffs cannot coordinate discovery with the government cases if discovery is stayed.

13 Facebook not only wants discovery delayed, but also wants it bifurcated between class
14 and merits, with merits being further bifurcated between monopoly acquisition and monopoly
15 maintenance stages. This request is also not appropriately litigated through a joint CMC
16 statement. Therefore, Plaintiffs will simply note that distinguishing class from merits discovery
17 (or types of merits discovery) in this case would be inefficient, lead to intractable disputes about
18 scope, and any departure from the default rules of civil litigation should be based on more than a
19 defendant's disputed claims that it will obtain an early win.

20 The Court should order Facebook to produce to Plaintiffs documents previously provided
21 to the government before the Rule 26(f) conference, as explicitly authorized by Rule 26(d)(1)
22 (allowing for discovery before the parties have conferred as required by Rule 26(f) "when
23 authorized . . . by stipulation, or by court order."). It is efficient—not premature—for Facebook
24 to provide Plaintiffs with readily ascertainable and available documents previously produced to
25 the government immediately. Production of such documents will be helpful in focusing both the
26 Rule 26(f) conference and subsequent discovery efforts. Early production of documents
27 provided to the government may also obviate or limit the need for Plaintiffs to later amend their
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consolidated complaints. Indeed, the clear trend among district courts, including those in this Circuit, in large complex antitrust cases, is to order the early production of documents produced by defendants to the government even before the consolidated complaint is filed. *In re Lithium Ion Batteries Antitrust Litigation*, No. 13-md-02420, 2013 U.S. Dist. LEXIS 72868, *25-32 (N.D. Cal. May 21, 2013) (requiring production of DOJ documents before consolidated amended complaints were filed); *In re Resistors Antitrust Litig.*, No. 5:15-cv-03820 (N.D. Cal. 2016), ECF No. 112, Minute Entry (“All DOJ documents are to be voluntarily produced to Plaintiffs by 4/29/2016. The Consolidated Amended Complaint shall be filed by 5/27/2016”); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices & Prods. Liab. Litig.*, No. 10-ML-02151 (C.D. Cal. June 1, 2010), ECF No. 180, “Order No. 3”, at 2 (ordering production of documents already produced to the government prior to the filing of the consolidated complaint).

B. Scope of Anticipated Discovery

Consumer Class Plaintiffs’ Statement: The Consumer Class Plaintiffs will seek documents and testimony from Facebook regarding, among other things: Facebook’s representations to consumers regarding Facebook’s privacy protections; Facebook’s harvesting of consumer data; Facebook’s disclosure of consumer data to third parties, including Facebook’s sale of consumer data to advertisers; Facebook’s intent to deceive consumers regarding Facebook’s privacy protections and commercial surveillance; Facebook’s surveillance of the websites and apps visited by Facebook’s consumers; Facebook’s acquisition of competitors and related negotiations; Facebook’s copying of competitors; Facebook’s policies and practices relating to access to Facebook’s Platform and consumer data; the relevant markets; Facebook’s market power and expansion in the relevant markets; barriers to entry and network effects in the relevant markets; and the effects of Facebook’s policies on competition and consumers. The Consumer Class Plaintiffs will also seek documents and testimony from non-parties, including Facebook’s (former) competitors.

1 The Consumer Class Plaintiffs object to Facebook’s proposal that Consumer and
 2 Advertiser Class Plaintiffs be required to jointly serve written discovery requests, and that the
 3 limits on written discovery “shall be applied on a per-side” basis.

4 Advertiser Class Plaintiffs’ Statement: The Advertiser Class Plaintiffs will seek
 5 documents and testimony from Facebook regarding, among other things, Facebook’s sales of and
 6 policies related to advertising; Facebook’s surveillance of the websites and apps visited by
 7 Facebook’s consumers; Facebook’s acquisition of competitors and related negotiations;
 8 Facebook’s copying of competitors; Facebook’s policies and practices relating to access to
 9 Facebook’s Platform and consumer data; the relevant markets; Facebook’s market power and
 10 expansion in the relevant markets; barriers to entry and network effects in the relevant markets;
 11 and the effects of Facebook’s policies on competition and advertisers. The Advertiser Class
 12 Plaintiffs will also seek documents and testimony from non-parties, including Facebook’s
 13 (former) competitors.

14 The Advertiser Class Plaintiffs object to Facebook’s proposal that Consumer and
 15 Advertiser Class Plaintiffs be required to jointly serve written discovery requests, and that the
 16 limits on written discovery “shall be applied on a per-side” basis.

17 **C. Protective Order**

18 Plaintiffs propose that the parties provide a stipulated Protective Order to the Court in
 19 advance of the Initial Case Management Conference, and no later than April 5, 2021. As set
 20 forth above, Plaintiffs request that Facebook immediately produce the documents identified in
 21 Section 8(A) no later than two business days after the entry of the Protective Order.

22 **D. Proposed Limitations or Modifications to the Discovery Rules**

23 *Depositions.* Plaintiffs believe that relief from the limitation on the number of
 24 depositions set forth in Rule 30(a)(2) is necessary and appropriate and proposes to meet and
 25 confer with Facebook and propose to the Court a stipulated deposition protocol to govern
 26 depositions in this action.

1 *Document Subpoenas to Non-Parties.* Plaintiffs propose as follows with respect to
2 nonparties producing materials in response to Fed. R. Civ. P. 45 document subpoenas in this
3 action. The issuing party shall request that non-parties simultaneously produce materials to
4 Plaintiffs and Facebook. If, notwithstanding such request, the non-party does not produce the
5 materials to both sides, the issuing party shall provide a copy of all materials to the other side
6 within three business days after receipt of the materials from the non-party, subject to any
7 limitations in the Protective Order. If a party modifies or extends the time to respond to a Fed.
8 R. Civ. P. 45 document subpoena (whether orally or in writing), it shall simultaneously notify the
9 other party of that extension, modification, or explanation, including providing copies of any
10 written agreements regarding modification or extension.

11 *Authenticity Presumptions.* Plaintiffs propose that documents produced by non-parties
12 from the non-parties' files shall be presumed to be authentic within the meaning of Fed. R. Evid.
13 901. Documents produced by Facebook shall be presumed to be authentic within the meaning of
14 Fed. R. Evid. 901. If a party serves a specific good-faith written objection to the authenticity of a
15 document that it did not produce from its files, the presumption of authenticity will no longer
16 apply to that document. Any objection to a document's authenticity must be provided with (or
17 prior to) the exchange of objections to trial exhibits. The parties will promptly meet and confer
18 to attempt to resolve any objections. The Court will resolve any objections that are not resolved
19 through this means or through the discovery process.

20 *Expert Discovery.* Plaintiffs propose that expert disclosures, including each side's expert
21 reports, shall comply with the requirements of Federal Rule of Civil Procedure 26(a)(2), except
22 as modified herein. Neither side must preserve or disclose, including in expert deposition
23 testimony, the following documents or materials: (i) any form of communication or work product
24 shared between any of the parties' in-house or outside litigation counsel and such party's
25 expert(s) or consultant(s), or between any of such party's experts or consultants themselves; (ii)
26 any form of communication or work product shared between an expert and persons assisting the
27 expert; (iii) expert's notes, unless they are expressly relied upon and/or cited in support of an
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1 opinion or fact; or (iv) drafts of expert reports, analyses, or other work product. The parties shall
2 disclose the following materials in connection with all expert reports: (a) a list by Bates number
3 of all documents relied upon by the testifying expert(s); (b) copies of any materials relied upon
4 by the expert not previously produced or otherwise generally available; and (c) for any
5 calculations appearing in the report, all data and programs underlying the calculation, including
6 all programs, models, and codes necessary to recreate the calculation from the initial (“raw”)
7 data files.

8 *Service.* Service of any documents not filed via ECF, including pleadings, discovery
9 requests, subpoenas for testimony or documents, expert disclosure, and delivery of all
10 correspondence, whether under seal or otherwise, shall be by email to all attorneys for the
11 receiving party; the parties will provide each with “service lists” that can be used to serve
12 documents. In the event the volume of served materials is too large for email and requires
13 electronic data transfer by file transfer protocol or a similar technology, or overnight delivery,
14 the serving party will telephone or email the other side’s principal designee when the materials
15 are sent to provide notice that the materials are being served. For purposes of calculating
16 discovery response times under the Federal Rules of Civil Procedure, electronic delivery shall be
17 treated the same as hand delivery.

18 *Coordination with the FTC and State AG Cases.* Plaintiffs propose that the parties use
19 their best efforts to coordinate discovery between this action and the FTC and State AG Cases.
20 Plaintiffs propose that the parties will meet and confer with each other, and with direction from
21 the Court, include the FTC and State Attorneys General in those meet-and-confer conferences,
22 concerning the particulars of, and appropriate scope of, coordination and cross-production of
23 discovery between the FTC and State AG Cases and this case. Plaintiffs anticipate that there will
24 be overlapping discovery and efforts to coordinate depositions.

25 **Defendant’s Position On Section 8 - Discovery:**

26 Facebook intends to file a motion to dismiss that should resolve this entire action, which
27 as the statements of facts above make clear, is not really an antitrust case at all. Facebook’s
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position is that formal discovery should await a ruling on the motion to dismiss, which would allow the Court and the parties to tailor the scope and timing of discovery to match the claims remaining in the case (if any).⁵ While this Court will of course hear and resolve the motions to dismiss itself, Judge Freeman’s ruling in *Reveal Chat* confirms that, at a minimum, there are serious questions regarding threshold issues that will be presented here that will fundamentally shape what remains of this case, if anything. For that reason, Judge Freeman has followed the prudent course of staying discovery until those issues are resolved in the *Reveal Chat* case, which has ensured that if discovery does begin, it will do so in an efficient and thoughtful manner. *Reveal Chat Holdco, LLC v. Facebook, Inc.*, No. 20-cv-00363-BLF, ECF No. 31 (N.D. Cal. Apr. 10, 2020). As noted, if plaintiffs in these cases do state a claim, Facebook may move to stay these cases pending resolution of the motions to dismiss the government cases. But in any case, if plaintiffs here do state a claim and discovery commences, Facebook’s position is that discovery should be bifurcated with discovery first limited to issues that relate to class certification, and then if a class is ultimately certified, turn to merits discovery.

A. Discovery Should Not Be Opened Before This Court Rules on the Motion to Dismiss And The Motions To Dismiss The Government Cases Are Resolved

Facebook recognizes that this Court’s general past practice in complex antitrust litigation has been to open discovery, at least in part, around the time that an operative complaint is filed. This case is different for two reasons.

⁵ This Court has “broad discretion to stay discovery pending the disposition of a dispositive motion.” *Gibbs v. Carson*, No. C-13-0860, 2014 WL 172187, at *3 (N.D. Cal. Jan. 15, 2014). The burdens of discovery in antitrust cases are an important consideration in the Court’s exercise of that discretion, which have often led courts to stay discovery pending resolution of a motion to dismiss antitrust claims. *See, e.g., Top Rank, Inc. v. Haymon*, No. CV 15-4961, 2015 WL 9952887, at *2 (C.D. Cal. Sept. 17, 2015) (citing *Twombly*’s discussion of the expense of antitrust discovery and noting “[s]taying discovery in antitrust cases pending the resolution of a motion to dismiss may be particularly appropriate.”); *In re Graphics Processing Units (GPU) Antitrust Litig.*, No. C-06-07417, 2007 WL 2127577 (N.D. Cal. July 24, 2007) (“[T]o allow antitrust discovery prior to sustaining a complaint would defeat one of the rationales of *Twombly*, at least when the discovery would be burdensome.”).

1 *First*, the existing complaints suggest that plaintiffs’ forthcoming CACs will fail to state a
2 claim under the antitrust laws. The conduct plaintiffs challenge largely mirrors the facts alleged
3 in *Reveal Chat*, 471 F. Supp. 3d at 1002. Indeed, the *Klein* complaint quotes many paragraphs
4 verbatim from the *Reveal Chat* complaint. *See Reveal Chat*, ECF No. 85 at 2-4 (identifying
5 identical and nearly identical language). There the Court held that challenges to the acquisitions
6 of Instagram and WhatsApp are time-barred, rejecting the same continuing-violation theory that
7 the *Klein* plaintiffs allege here. The *Reveal Chat* Court also agreed with Facebook that a Section
8 2 claim challenging Facebook’s API policy changes failed because there was no cognizable
9 duty-to-deal allegation and because the narrow *Aspen Skiing* exception did not apply. *See Reveal*
10 *Chat*, 471 F. Supp at 1002-1003. Judge Freeman appropriately stayed discovery pending the
11 resolution of Facebook’s motions to dismiss, *Reveal Chat*, ECF Nos. 31, 66, and that has already
12 ensured that any discovery that may occur will be far narrower than it would have been had it
13 commenced following the first complaint. There is no reason to believe that plaintiffs’ claims
14 here—which, if anything, are even more belated and flawed than those of the *Reveal Chat*
15 plaintiffs—will survive a motion to dismiss. And even if the Court were not inclined to grant a
16 motion to dismiss in full, plaintiffs’ complaints are littered with unprecedented antitrust theories
17 and damage claims tied to their use of free products. It is likely that the scope of discovery will,
18 if nothing else, be far narrower after the motion to dismiss is decided.

19 *Second*, the need for immediate discovery is lessened by the pendency of two
20 substantially similar pending antitrust cases brought by the FTC, and 46 states, the District of
21 Columbia, and Guam (the “Plaintiff States”) on December 9, 2020. Holding off discovery in this
22 case will permit more efficient coordination with the government cases. Discovery has not yet
23 commenced pursuant to local rule in the government cases, and is awaiting the outcome of
24 Facebook’s motion to dismiss. *See* Fed. R. Civ. P. 26(d) (discovery cannot begin until Rule
25 26(f) conference); D.D.C. LCvR 16.3(b) (no Rule 26(f) conference in cases where no answer has
26 yet been filed). Opening discovery now could result in these cases moving ahead of the
27 government cases, which would both be inefficient and inconsistent with congressional intent.
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1 Discovery should be coordinated across the cases, which cannot meaningfully happen
2 until the scope of all the cases is clearer. Plaintiffs themselves recognize the importance of
3 coordination with the government cases, and propose above that the parties use their best efforts
4 to coordinate discovery with the government cases. *See also, e.g.*, ECF No. 55 at 21 (discussing
5 counsel’s “strong relationships and open channels of communication with the public entities
6 which are also pursuing antitrust actions against Facebook”).

7 Indeed, this Court has experience establishing clear, workable rules for coordination in
8 the early stages of parallel, overlapping litigation. In the *Qualcomm* cases, this Court entered a
9 coordinated discovery order between the FTC case and cases brought by private litigants, Joint
10 Stipulation and Discovery Coordination Order, *In re Qualcomm Antitrust Litig.*, No. 17-md-
11 2773-LHK, ECF No. 131 (N.D. Cal. Sept. 22, 2017), which it then broadened to cover a case
12 involving overlapping issues in the Southern District of California, *In re Qualcomm*, ECF No.
13 515. A similar order, accounting for the differences in the posture of the various cases, should be
14 entered in this case before discovery begins.

15 Furthermore, Facebook’s discovery proposal recognizes that ensuring the government
16 cases go first will likely narrow the issues before this Court and thereby promote judicial
17 economy. For example, if the Court enters final judgment for the FTC, that decision may be
18 prima facie evidence against Facebook. *See* 15 U.S.C. § 16(a). If Facebook prevails against the
19 States, plaintiffs in this case would be bound by the judgment, because the States are deemed to
20 represent all of their citizens under the doctrine of *parens patriae*. *See Satsky v. Paramount*
21 *Comm’ns, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993) (because “the citizens of [a] state are
22 represented in such litigation by the state,” they “are bound by the judgment”); *Menzel v. County*
23 *Utilities Corp.*, 501 F. Supp. 354, 357 (E.D. Va. 1979) (“under the doctrine of *parens patriae*, a
24 state is deemed to represent all of its citizens, when the state is a party in a suit involving a
25 matter of sovereign interest,” and “[t]here is a presumption that the state [] will represent
26 adequately the position of its citizens”); *see also Alaska Sport Fishing Ass’n v. Exxon Corp.*, 34
27 F.3d 769, 773 (9th Cir. 1994) (“Under the *parens patriae* doctrine, a state that is a party to a suit
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involving a matter of sovereign interest is presumed to represent the interests of all its citizens.”); *Northern Calif. River Watch v. Humboldt Petroleum, Inc.*, 162 F. App’x 760, 765 (9th Cir. 2006) (corporation’s suit was barred by *res judicata* because its claims were covered by defendant’s consent agreement with the state).

Allowing the government cases to proceed first also reduces the risk of inconsistent judgments between the government cases and this litigation. All three lawsuits (the two government actions and this case) allege that Facebook unlawfully maintained monopoly power by thwarting competition through, for instance, a strategy of copying, acquiring, or killing competitors, thus harming both users and advertisers. *See, e.g.*, FTC Compl. ¶¶ 1-9; Compl. (“State AG Compl.”) ¶ 4, State AG Case, ECF No. 4 (D.D.C. Dec. 9, 2020). If these cases were to proceed on parallel and uncoordinated tracks, there is a risk of inconsistent judgments on threshold issues and necessary elements of the antitrust claims, including relevant market definition(s), proof of monopoly power, and proof of harm to competition. Again, allowing the government cases to go first could significantly streamline (or altogether dispose of) issues in this case.

Facebook anticipates that the parties can efficiently address this issue at the upcoming Case Management Conference, but if the Court would find briefing on a motion helpful—as Plaintiffs seem to suggest—Facebook requests that the Court set a briefing schedule so that this issue can be resolved before any discovery, including Plaintiff’s request for unilateral early discovery, commences.

B. If And When Discovery Opens, It Should Be Bifurcated

1. Class Discovery

If discovery does commence, it should be bifurcated between class and merits issues. Other courts within this district have adopted phased or bifurcated discovery schedules in class actions where dispositive issues are distinct from the merits of the plaintiffs’ claims. *See, e.g.*, Civil Minute Order, *In re Coca-Cola Prods. Mktg. & Sales Practices Litig.*, No. 4:14-md-2555 (N.D. Cal. July 10, 2015), ECF No. 69 (White, J.) (setting initial phase of discovery in false

1 advertising suit into whether the named plaintiffs relied on the alleged false advertisements);
2 Order Following Further Case Management Conference at 1-2, *In re Apple iTunes iPod Antitrust*
3 *Litig.*, No. 4:05-cv-37 (N.D. Cal. Nov. 21, 2006), ECF No. 86 (Rogers, J.) (ordering initial phase
4 of discovery limited to class-certification issues). There will be no risk of delay or prejudice to
5 the private plaintiffs here because these same issues will be developed by the government
6 plaintiffs, including the States who are acting on the plaintiffs' behalf. Furthermore, bifurcation
7 is consistent with Facebook's proposal to allow the government plaintiffs to go first to streamline
8 the merits issues in these cases. Class certification is of course unique to the private cases and
9 will allow discovery to be sensibly coordinated: the government will go first with merits
10 discovery while the private plaintiffs and Facebook address issues of class certification, and then
11 if a class is certified, the private plaintiffs can "backfill" any additional discovery that they need.

12 In addition, the class issues in this case are unique and can be readily separated from the
13 merits issues. These issues include whether the case should be properly tried as a class action at
14 all. Facebook therefore proposes an initial phase of discovery regarding (i) plaintiffs' method for
15 proving their tolling theories on a class-wide basis, (ii) plaintiffs' method for proving antitrust
16 impact on a class-wide basis, (iii) plaintiffs' reliance, if any, on Facebook's alleged statements
17 regarding its privacy policy; and (iv) plaintiffs' class-wide damages model. To give an example,
18 plaintiffs must provide a damages model that shows that damages are susceptible to
19 measurement across the entire class. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013).
20 But Facebook's product is free, and the user plaintiffs' purported injuries—in the form of
21 supracompetitive levels of "information and attention"—have no connection to any price.
22 Instead, information and attention are valued differently by different users, if they are valued at
23 all. Ascribing a monetary value to them will be an unprecedented and highly speculative
24 exercise, which will be further compounded by the need for plaintiffs to show the baseline level
25 of "information and attention" they would have given in a counterfactual, allegedly more
26 competitive market.

1 With respect to the proposed advertiser class, plaintiffs will need to show not just that
2 they were purportedly overcharged for advertising (and by how much they were overcharged),
3 but also what their volume of ad purchases would have been in the counterfactual market, as well
4 as how Facebook's status as a non-monopolist in that counterfactual market would have affected
5 their overall ad purchase strategies. Meanwhile, advertiser decisions are *sui generis* and vary by
6 the size of the advertiser and its business strategy. This is highly individualized and likely
7 requires an assessment of each advertiser's unique business model. Again, it is difficult to
8 imagine a poorer fit for class treatment. Facebook intends to focus class discovery on
9 advertisers' choices in the broad relevant market, Facebook's prices during the putative class
10 period, and related materials.

11 Given the cost and expense associated with antitrust merits discovery, assessing whether
12 plaintiffs can realistically certify a class may obviate the need for more burdensome merits
13 discovery, particularly since class certification issues could be dispositive.

14 **2. Merits Discovery**

15 Facebook proposes that if a class is ultimately certified, the Court schedule a case
16 management conference for 30 days after its class certification ruling for the parties to address
17 the scope and procedure for merits discovery, including the process for additional coordination
18 with the government cases. Depending on the timing of the government cases, Facebook
19 believes phasing of merits discovery may make sense, with an initial stage of discovery focused
20 on Plaintiffs' theory that nearly fifteen years ago Facebook illegally *acquired* a monopoly (a
21 theory notably *not* alleged by the government plaintiffs) and then a second phase of merits
22 discovery targeted at plaintiffs' monopoly maintenance theory, which overlaps almost
23 completely with the government cases, and is rooted in conduct between six and ten years old.

C. This Court Should Reject Plaintiffs’ Discovery Proposal

1. Plaintiffs’ Request for Immediate, Cloned Discovery Is Premature and Overbroad

Plaintiffs ask this Court to order Facebook to immediately and prematurely produce all documents provided to competition regulators across the globe as well as the entire documentary records of a laundry list of other private litigations that span well over a decade. This request should be denied.

Plaintiffs misleadingly suggest that cloned discovery is a “clear trend among district courts.” This is incorrect. “Asking for all documents produced in another matter is not generally proper,” and courts routinely reject requests for cloned discovery as presumptively overbroad or irrelevant “even if the subject matter of [the] cases seem to overlap.” *Ludlow v. Flowers Foods, Inc.*, 2019 WL 6252926, at *18 (S.D. Cal. Nov. 22, 2019). Wholesale cloned discovery like that sought by the plaintiffs is improper where, as here, the responses “would include documents irrelevant to plaintiffs’ case.” *Rodriguez v. Google, Inc.*, 2021 U.S. Dist. LEXIS 23824, at *6 (N.D. Cal. Feb. 8, 2021) (Tse, J.); *Schneider v. Chipotle Mexican Grill, Inc.*, 2017 WL 1101799, at *4 (N.D. Cal. Mar. 24, 2017) (Westmore, J.) (productions in a matter that “is broader than the instant case” not subject to cloned discovery because they “may involve documents that are not relevant on their face”).

The documents sought in the FTC and State AG investigations, just two of the many matters from which plaintiffs demand wholesale cloned discovery, include documents related to a number of topics that are far afield of plaintiffs’ claims, including merely by way of example: submissions to regulatory authorities in connection with investigations of third parties unrelated to these cases, such as Facebook’s response to an FTC subpoena concerning a transaction to which it was not a party; submissions to regulatory authorities in connection with other investigations of Facebook’s unrelated to this case, such as Facebook’s efforts to develop a digital currency called Libra; policies concerning identity verification and security measures taken to address fake and duplicate accounts; and information about ancillary features on mobile

1 apps such as “stickers,” “avatars,” “masks,” and “voice filters.” Other government investigations
 2 have been similarly sweeping and likewise required production of documents wholly unrelated to
 3 this case. For example, the materials sought in the House Judiciary Committee’s digital markets
 4 investigation include documents and information related to Facebook products and programs that
 5 are not at issue in this litigation, including Oculus (a virtual reality platform), Facebook
 6 Payments (an in-app payments product), and FbStart (a program designed to help mobile startups
 7 succeed).⁶ Documents produced in response to these requests obviously have no bearing on any
 8 plaintiff’s claims in this case. No plaintiff has raised a claim related to Facebook’s digital
 9 currency, payments, or virtual reality products; the deletion of fake Facebook accounts; and
 10 certainly not about Facebook’s regulatory submissions in investigations of mergers to which
 11 Facebook was *not a party*.

12 Further, the German Federal Cartel Office⁷ and the Australian Competition and
 13 Consumer Commission⁸—other regulators that plaintiffs have demanded Facebook’s
 14 submissions to—sought information related to conduct taking place entirely within those
 15 countries. Plaintiffs’ request for wholesale reproduction of documents from a laundry list of
 16 other litigations fares no better. Plaintiffs have not sought to relate those cases to this one, and
 17 have offered no explanation for why the documents produced in those cases would be relevant
 18 here. As just one example, Plaintiffs seek Facebook’s document production from a state court
 19 litigation in which a third-party app developer has asserted, over the course of six different
 20 complaints, a variety of claims ranging from breach of contract to intentional interference with
 21 contract, among others, for changes Facebook made to its APIs that impacted how app
 22 developers (not users or advertisers) can access Facebook’s platform.

24 ⁶ See

25 <https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/facebook%20rfi%20-%20signed.pdf>.

26 ⁷ See

27 <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html>.

28 ⁸ See <https://www.accc.gov.au/focus-areas/digital-platforms>.

1 And even with respect to document requests from regulators that do overlap with the
 2 issues in this case, it is far from clear that the entire production set would be relevant. As Judge
 3 Chhabria recently remarked with respect to a similar request for cloned discovery propounded on
 4 Facebook, “I don’t think it would be appropriate for me to order” “Facebook . . . without doing
 5 any further review to turn over exactly what it turned over to the government.” Tr. of
 6 Proceedings at 8:12-15, *In re Facebook, Inc. Consumer Privacy Litig.*, No. 18-md-2843-VC
 7 (N.D. Cal. Jan. 8, 2020). This is so because, he explained, “when you turn stuff over to the
 8 Government, you worry—you do worry less about relevance You do worry less about
 9 turning over something that might not be subject to discovery because it is not relevant at all . . .
 10 because you are dealing with the Government and you are trying to—you know, it is a different
 11 calculus.” *Id.* at 8:21-9:2.

12 Moreover, the size of the production that plaintiffs demand belies plaintiffs’ proffered
 13 justification that cloned discovery would be “efficient.” Facebook produced almost nine million
 14 documents—totaling approximately 35 million pages—to the FTC and State AGs alone. The
 15 notion that plaintiffs would somehow be able to *undertake the time and expense to* review these
 16 documents at all, let alone in the proposed 30 days between their production and plaintiffs’
 17 proposed Rule 26(f) conference in order to “focus[]” the discussion at the conference, is not
 18 credible.

19 Thus, while reviewing millions upon millions of documents in a month may enable class
 20 counsel to run up substantial legal fees, the wholesale reproduction of millions of documents
 21 does nothing to promote reasonable, efficient, and proportional discovery into the issues that
 22 may actually be relevant to this case.⁹

23 Furthermore, Facebook’s productions to government regulators generally were provided
 24 under a single confidentiality designation. Facebook expects that the protective order ultimately
 25 entered in this case may have multiple tiers of confidentiality, requiring a re-review of the

26
 27 ⁹ Plaintiffs offer no explanation of why the Federal Rules’ and this Court’s ediscovery guidelines
 28 and checklists requirements that discovery sought be relevant and proportional to the needs of
 the case should not apply in “large complex antitrust cases.”

1 productions for classification into the appropriate confidentiality tier. That itself eliminates the
2 illusory efficiency rationale that plaintiffs assert for their sweeping request for reproduction of
3 documents from dozens of regulatory inquiries and litigations.

4 In short, plaintiffs' request for any discovery is both improperly overbroad and
5 premature. A more appropriate pre-Rule 26(f) conference disclosure would be the document
6 requests themselves, rather than what was produced in response to them. To that end, if the
7 Court believes some early discovery is appropriate, Facebook proposes to produce to plaintiffs
8 the Civil Investigative Demands issued by the FTC, and the subpoenas propounded by the
9 Plaintiff States, in advance of the Rule 26(f) conference.

10 Those materials would enable plaintiffs to begin to assess the subject matter and
11 relevance of the documents actually in the productions that plaintiffs seek, and the parties could
12 meet and confer on what readily-available materials Facebook may be able to produce that would
13 be relevant and proportional to the needs of this case. As Judge Chhabria explained, the
14 appropriate production for Facebook to make would be "whatever is responsive . . . to the
15 discovery requests in this case." Tr. of Proceedings at 38:15-18, *In re Facebook, Inc. Consumer*
16 *Privacy Litig.*, No. 18-md-2843-VC (N.D. Cal. Nov. 11, 2019). Facebook would, of course, be
17 willing to produce responsive materials properly subject to discovery at an appropriate time,
18 notwithstanding the fact that those materials were previously provided to government regulators.

19 Plaintiffs falsely (and bizarrely) state that Facebook has refused to provide those
20 materials. To the contrary, Facebook's proposal explicitly contemplates that Facebook would
21 provide those materials as part of its discovery proposal. Plaintiffs have rejected that proposal
22 flat out.

23 Finally, should the Court open discovery early by requiring Facebook to produce
24 materials in advance of the Rule 26(f) conference over Facebook's objection, Facebook should
25 be permitted to serve discovery on plaintiffs. Plaintiffs offer no explanation of why they should
26 enjoy a period of unilateral discovery, and the Federal Rules contemplate no such thing.

**2. Plaintiffs' Proposal To Use "Best Efforts" To Coordinate Discovery
With The Government Cases Is Insufficient**

All parties agree that discovery will need to be coordinated with the government cases. This Court recognized the same at the hearing to appoint interim class counsel. Tr. at 28:4-5 ("I would assume there would be some coordination, especially on discovery."). A plan for coordination between the government cases needs to be put in place before discovery begins in this case. A promise to use "best efforts" is an empty gesture, not a workable proposal. Instead, as noted, there should be a uniform coordination order entered before any discovery takes place.

Moreover, plaintiffs' proposal that the parties will submit a protective order in advance of this Case Management Conference—which would be less than two weeks after plaintiffs provided a draft to Facebook—is simply unworkable. For one, Facebook has already advised Plaintiffs and the Court that there will be significant issues that need to be resolved in the context of the protective order because of the overlap between counsel in these cases and in other antitrust cases with overlapping issues. For example, some of the same attorneys from Keller Lenkner firm, which serves on the Executive Committee for the user class, are representing the state of Texas in an antitrust case against Google in which Facebook is named a purported "co-conspirator" and in which significant discovery has been sought from Facebook. Likewise, as Facebook explained and the Court contemplated at the March 18 hearing, there will need to be some coordination of discovery with the FTC and States' cases, which will itself require special protective order provisions. Facebook also continues to investigate the sufficiency of the screen Keller Lenkner imposed on one of its attorneys who had previously done hundreds of hours of work on behalf of Facebook on the related FTC and state AG antitrust investigations. The scope and contours of a protective order in this case should be decided only after resolution of the motions to dismiss in the FTC and States' cases pursuant to the local rules and issues remaining in those cases, if any, and then if necessary or appropriate, after entry of a protective order in those matters tailored to those cases. The parties in those cases have not yet had an opportunity to negotiate the terms of a protective order, or submit such an order to the Judge overseeing those

1 matters to solicit and receive guidance on the appropriate provisions. All of this to say,
2 Facebook will of course work with plaintiffs to reach resolution on a reasonable protective order
3 that appropriately addresses the complexities of this case. But the parties need more than ten
4 days to negotiate a draft protective order given the specific issues involved here.

5 **3. Other Elements of Plaintiffs' Discovery Proposal Are Deficient**

6 While it is premature to address most, if not all, specific procedures governing discovery,
7 plaintiffs make a number of proposals to which Facebook objects. For example, Facebook does
8 not agree that a blanket presumption of authenticity should attach to all documents produced in
9 discovery, but Facebook is of course willing to confer on possible stipulations as to the
10 authenticity of different categories of documents as the case progresses. And with respect to
11 plaintiffs' proposal regarding preservation of particular categories of information, the parties
12 should address the scope of preservation when the parties meet and confer concerning ESI at the
13 Rule 26(f) conference or otherwise as appropriate and not piecemeal. Further, while the scope of
14 the plaintiffs' cases as alleged would likely militate in favor of an additional number of
15 depositions, Facebook believes that after its motion to dismiss is decided, to the extent that any
16 issues remain, they will be far narrower and circumscribed to the statute of limitations period. In
17 that case, the limit in the Federal Rules may well be sufficient.

18 If and when discovery opens, Facebook proposes that at least the following rules govern.
19 First, the user and advertiser plaintiffs shall jointly serve requests for production, requests for
20 admission, and interrogatories to the extent that they seek information relevant to both actions.
21 Second, the user and advertiser plaintiffs shall jointly notice and conduct fact-witness
22 depositions and depositions pursuant to Fed. R. Civ. P. 30(b)(6) such that the same witness need
23 not be made available more than once. Third, the limits on discovery found in Rules 30, 31, and
24 33, or as otherwise agreed to by the parties or ordered by the Court, shall be applied on a per-side
25 and not per-party basis.

1 **9. Class Action**

2 This case is a putative class action. Counsel for both sides have reviewed the Procedural
3 Guidance for Class Action Settlements.

4 Plaintiffs propose that two or more classes be certified pursuant to Federal Rule of Civil
5 Procedure 23(b)(3) and to file a motion for class certification as set forth in Plaintiffs' proposed
6 schedule.

7 Facebook contends that plaintiffs cannot satisfy the class-certification prerequisites or
8 requirements set forth in Fed. R. Civ. P. 23, and that the parties should proceed with bifurcated
9 discovery and focus on discovery related to class certification before turning to discovery on the
10 merits.

11 **10. Related Cases**

12 In addition to the ten related private actions that have been consolidated with this case,¹⁰
13 related lawsuits filed by the FTC and State Attorneys General are currently pending in the
14 District Court for the District of Columbia. Both the FTC and the States have filed related case
15 notices for the vast majority if not all of the private actions. *See* FTC Case, ECF Nos. 4, 10, 28,
16 31, 44, 45, 52, 53, 54, 55, 57, 58; State AG Case, ECF Nos. 5, 9, 14, 56, 85, 86, 109, 110, 116.

17 Complaints in both cases contain allegations that overlap with the anticipated allegations
18 in plaintiffs' forthcoming CACs, including that Facebook allegedly holds monopoly power in the
19 market for personal social networking services in the United States, FTC Compl. ¶ 2, State AG
20

21 ¹⁰ *Mark K. Wasvary, P.C. v. Facebook, Inc.*, No. 21-CV-001518-SK (N.D. Cal. filed March 3,
22 2021); *Kovacevich v. Facebook, Inc.*, No. 21-CV-01117-JCS (N.D. Cal. filed Feb. 15, 2021);
23 *Rosenman v. Facebook, Inc.*, No. 21-CV-00336-VC (N.D. Cal. filed Feb. 5, 2021); *Garvin v.*
24 *Facebook, Inc.*, No. 21-CV-00618-KAW (N.D. Cal. filed Jan. 26, 2021); *Layser v. Facebook,*
25 *Inc.*, No. 21-CV-00337-VC (N.D. Cal. filed Jan. 13, 2021); *Affilious, Inc. et al. v. Facebook,*
26 *Inc.*, No. 20-CV-09217-EMC (N.D. Cal. filed Dec. 18, 2020); *Steinberg v. Facebook, Inc.*, 20-
27 CV-09130-VC (N.D. Cal. filed Dec. 17, 2020); *Dames et al. v. Facebook, Inc.*, No. 20-cv-
28 08817-HSG (N.D. Cal. filed Dec. 11, 2020); *Kupcho v. Facebook, Inc.*, No. 20-CV-08815-JSW
(N.D. Cal. filed Dec. 11, 2020); *Sherman v. Facebook*, No. 20-CV-08721-JSW (N.D. Cal. filed
Dec. 9, 2020). As noted above, Facebook anticipates moving to relate *Ryan v. Facebook, Inc.*,
No. 21-CV-2017 (N.D. Cal. filed Mar. 23, 2021) and the re-filed *Rosenman v. Facebook, Inc.*,
No. 21-CV-2108 (N.D. Cal. removed Mar. 25, 2021) to this case as well.

Compl. ¶ 4, and that Facebook allegedly engaged in anticompetitive conduct to eliminate threats to its supposed monopoly, including its acquisitions of Instagram and WhatsApp, FTC Compl. ¶ 5, State AG Compl. ¶¶ 12. According to the FTC and the States, this alleged anticompetitive conduct harmed both “users” and advertisers, FTC Compl. ¶¶ 27-28; State AG Compl. ¶ 4. In addition, both government complaints request injunctive relief and divestiture of Instagram and WhatsApp, *see* FTC Compl. Prayer for Relief; State AG Compl. ¶ 277, similar to the relief anticipated in plaintiffs’ CACs.

The proceedings in the government lawsuits are ahead of those in this action, with Facebook’s motions to dismiss in those cases already filed and the government’s oppositions due before the deadline for the private plaintiffs to file the CACs. *See* FTC Case, ECF No. 56; State AG Case, ECF No. 114.

11. Relief

Consumer Class Plaintiffs’ Statement: The Consumer Class Plaintiffs seek damages to the maximum extent authorized by applicable federal and state law, including treble damages, or, alternatively, restitution and/or disgorgement of all amounts wrongfully charged to and received from Plaintiffs. Plaintiffs also seek injunctive and declaratory relief, as well as attorneys’ fees and costs.

Advertiser Class Plaintiffs’ Statement: The Advertiser Class Plaintiffs seek damages to the maximum extent authorized by law, including treble damages, or, alternatively, restitution and/or disgorgement of all amounts wrongfully charged to and received from Plaintiffs. Plaintiffs also seek injunctive and declaratory relief, as well as attorneys’ fees and costs.

Facebook Statement: There is simply no reason to allow the user plaintiffs to proceed with a damages claim. Facebook is free and the antitrust laws do not permit recovery for the nonpecuniary “injuries” claimed by the plaintiffs.

12. Settlement and ADR

No settlement discussions have taken place. The parties have discussed ADR and do not believe that ADR would be constructive at this time and likely will not be until the government

1 cases are resolved. As the case progresses, the parties are of course willing to engage in ADR
 2 with a private mediator if it would be productive. The parties have complied with ADR Local
 3 Rule 3-5.

4 **13. Consent to Magistrate Judge For All Purposes**

5 A number of plaintiffs have declined to consent to proceed before a magistrate judge for
 6 all purposes.

7 **14. Other References**

8 The parties do not believe this case is suitable for reference to a special master or the
 9 Judicial Panel on Multidistrict Litigation.

10 **15. Narrowing of Issues**

11 **Plaintiffs' Position:**

12 Consistent with the Court's direction, ECF No. 74, the Consumer and Advertiser Class
 13 Plaintiffs together will not be bringing more than 10 claims collectively in the forthcoming
 14 CACs.

15 Plaintiffs will consider issues that can be narrowed by agreement or by motion, as well as
 16 potential means to expedite the presentation of evidence at trial.

17 **Defendant's Position:**

18 The FTC and State AG cases currently pending in the U.S. District Court for the District
 19 of Columbia both challenge substantially the same conduct that is at issue here. *See generally*
 20 FTC Compl.; State AG Compl. The most efficient way to narrow the issues in these actions and
 21 expedite the presentation of evidence at trial is for this Court to set a schedule ensuring that
 22 discovery is bifurcated and that the two government cases reach final judgments before these
 23 cases do.

24 Should the FTC obtain a final judgment in its enforcement action, that judgment may be
 25 prima facie evidence against Facebook in the instant cases. *See* 15 U.S.C. § 16(a). And should
 26 Facebook prevail in the State AG case, a *parens patriae* action, that judgment will have
 27 preclusive effect and bar the overlapping claims brought by any of the named plaintiffs and
 28

putative class members who are citizens of the Plaintiff States. *See Satsky*, 7 F.3d at 1470 (“When a state litigates common public rights” such as competition issues, “the citizens of that state are represented in such litigation by the state and are bound by the judgment”); *Menzel v. County Utilities Corp.*, 501 F. Supp. 354, 357 (E.D. Va. 1979) (“under the doctrine of *parens patriae*, a state is deemed to represent all of its citizens, when the state is a party in a suit involving a matter of sovereign interest,” and “[t]here is a presumption that the state [] will represent adequately the position of its citizens”); *see also Alaska Sport Fishing Ass’n*, 34 F.3d at 773 (private claims barred by *res judicata* following State’s entry into consent decree resolving claims arising out of the same facts); *Northern Calif. River Watch*, 162 F. App’x at 765 (similar).

Accordingly, allowing the government cases to proceed to final judgment may substantially narrow the scope of contested issues in these consolidated cases, and will allow the parties to streamline discovery and their presentations at trial should these cases proceed.

16. Expedited Trial Schedule

The parties do not consent to the Expedited Trial Procedure of General Order No. 64.

17. Scheduling

Facebook filed its motions to dismiss both the FTC and State Attorneys General actions on March 10, 2021; the oppositions to the motions to dismiss are due April 7, 2021; and Facebook’s replies in support of its motions to dismiss are due April 21, 2021. No schedule has otherwise been proposed or entered in those cases.

Plaintiffs’ Position:

Plaintiffs will use their best efforts to coordinate with the FTC and State AG Cases. However, upon review of Facebook’s positions herein, it is apparent that Facebook seeks to leverage the pendency of the FTC and State AG cases to unreasonably delay this case—seeking, for example, a trial date in mid-2025 *or later*, predicated on Facebook’s assumption that the government cases against Facebook may go to trial in mid-2024 (no schedule has been set in the government cases). *Infra* at 41-42. To avoid such unreasonable delay, Plaintiffs respectfully request the Court enter a pretrial schedule at this time. Plaintiffs propose the following schedule.

Event	Date
Filing of Joint Case Management Statement	March 31, 2021 (ECF No. 74)
Filing of Protective Order	April 5, 2021
Initial Case Management Conference	April 7, 2021 (ECF No. 74)
Filing of Consolidated Amended Complaints	April 22, 2021 (ECF No. 74)
Rule 26(f) Conference Deadline	April 29, 2021
Facebook's Motion to Dismiss Consolidated Amended Complaints	May 20, 2021 (ECF No. 74)
Parties begin production of documents and transactional data on rolling basis	June 1, 2021
Plaintiffs' Oppositions to Motion to Dismiss	June 17, 2021 (ECF No. 74)
Facebook's Reply in support of Motion to Dismiss	July 1, 2021 (ECF No. 74)
Hearing on Motion to Dismiss	July 15, 2021 at 1:30 p.m. (ECF No. 74)
Parties substantially complete production of documents and transactional data	September 1, 2021
Plaintiffs' Opening Expert Reports	March 1, 2022
Plaintiffs' Motion for Class Certification	March 15, 2022
Facebook's Expert Reports	April 5, 2022
Facebook's Opposition to Motion for Class Certification	April 19, 2022
Close of Fact Discovery	April 19, 2022
Plaintiffs' Rebuttal Expert Reports	May 10, 2022
Plaintiffs' Reply in support of Motion for Class Certification	May 17, 2022
Hearing on Motion for Class Certification	May 31, 2022 at 1:30 p.m.
Close of Expert Discovery	May 31, 2022
Last Day to File Dispositive Motions and Daubert Motions	June 21, 2022
Summary Judgment and Daubert Oppositions	July 19, 2022
Summary Judgment and Daubert Replies	August 9, 2022
Hearing on Dispositive Motions	August 23, 2022 at 1:30 p.m.
Final Pretrial Conference	October 25, 2022 at 1:30 p.m.
Trial	November 8, 2022 at 9:00 a.m.

Defendant's Position:

In plaintiffs' first draft of this Case Management Statement they affirmatively proposed that "this case should be coordinated with the FTC and State Attorneys General actions" and proposed that "a pretrial schedule in this case not be set until a schedule is entered in the FTC and State Attorneys General actions." Plaintiffs maintained that position through the exchange of multiple drafts between the parties and a telephonic meet-and-confer about this Case

Management Statement. Facebook agreed with this proposal. But at 5:30 p.m. Pacific Time on the day that this submission was due, and with no explanation, plaintiffs withdrew their proposed agreement and now request that this Court set a pretrial schedule immediately and no longer support coordination.

Whatever prompted the unexplained, eleventh-hour about-face, plaintiffs themselves repeatedly acknowledged that it is premature to set a schedule in this case. And for good reason. Given the nature of this proceeding, including the weaknesses of plaintiffs' claims and the substantial overlap with the government cases, it would be premature to schedule deadlines beyond the hearing on the motion to dismiss at this early date. That will ensure that these cases can be scheduled in a manner consistent with the government cases, which will maximize the effectiveness of any coordination. It also allows for all parties to negotiate a protective order that will ensure consistent treatment of both Facebook and nonparty confidential information.

If this case proceeds to discovery, Facebook proposes that it proceed in a bifurcated manner, as described above. Facebook proposes that the parties confer on an appropriate schedule if any of plaintiffs' claims survive Facebook's motion to dismiss and that a case management conference be scheduled for 30 days after the Court's ruling on the motion to dismiss. The Court has adopted this step-wise approach in prior proceedings. *See, e.g., CMO, In re Anthem Data Breach Litig.*, No. 5:15-md-02617-LHK, ECF No. 326 (N.D. Cal. Oct. 25, 2015); *CMO, In re Yahoo! Inc. Customer Data Security Breach Litig.*, No. 5:16-md-02752-LHK, ECF No. 89 (N.D. Cal. May 4, 2017).

In the event that the Court elects to schedule beyond the motion to dismiss hearing, Facebook proposes, again consistent with its proposal for bifurcated discovery, dates through the conclusion of a hearing on class certification.

Event	Facebook's Proposal
Initial Case Management Conference	April 7, 2021
Filing of Consolidated Class Action Complaint ("CAC")	April 22, 2021
Facebook's Motion to Dismiss the Consolidated Complaint	May 20, 2021

1	Plaintiffs' Opposition to Facebook's	June 17, 2021
2	Motion to Dismiss the Consolidated	
3	Complaint	
4	Facebook's Reply in Support of Motion to	July 1, 2021
5	Dismiss the Consolidated Complaint	
6	Hearing on Motion to Dismiss	July 15, 2021
7	Deadline to Finish Meeting and Conferring	July 22, 2021 or 30 days after entry of Protective
8	Regarding ESI and Confidentiality Orders	Order and Case Management Order in FTC and
9		State AG cases, whichever is later
10	Rule 26(f) Conference Deadline	August 15, 2021 or 56 days after entry of
11		Protective Order and Case Management Order in
12		FTC and State AG cases, whichever is later
13	Initiation of Class Discovery	September 7, 2021
14	Class Discovery Cutoff	April 1, 2022
15	Plaintiffs' Motion for Class Certification	June 3, 2022
16	Including Expert Declarations	
17	Opposition to Class Certification	July 1, 2022
18	Reply in Support of Class Certification	July 15, 2022
19	Hearing on Motion for Class Certification	August 1, 2022
20	Merits Discovery Case Management	September 6, 2022
21	Conference	

22 To the extent the court is inclined to set a schedule beyond class certification, plaintiffs'

23 proposed schedule is unworkable for a number of reasons. To give the Court some context, in

24 the government enforcement action filed by the DOJ late last year against Google in a narrower

25 case than this one, another court in the U.S. District Court for the District of Columbia set a fact

26 discovery period of fifteen months, with trial set for late 2023. A similar schedule for the

27 government enforcement cases against Facebook would likely see fact discovery extend to the

28 Fall of 2022, with trial in mid-2024.

Moreover, as the Court and various counsel for the plaintiffs acknowledged at the March 18, 2021 hearing to appoint interim class counsel, this case is extraordinarily complex. Tr. at 22:20 (the Court describing this as a "big complex case[]"), 61:25-62:1, 69:1-2, 71:11-12, 72:5-6 ("It's hard at this stage to understand just how complex it's going to get."). Plaintiffs' counsel also explained: "Facebook is a huge company. There's multiple areas of discovery which is going to be large." *Id.* at 63:18-19.

1 Nevertheless, plaintiffs propose to conduct class certification proceedings, fact discovery,
2 and expert discovery at the same time. They would also have expert reports served before the
3 close of fact discovery. This proposal should be a non-starter. As an initial matter, plaintiffs'
4 efforts to certify classes here will involve novel and speculative theories. As explained above, to
5 determine whether this case may properly proceed as a class action, class certification issues
6 should be resolved prior to any further case activities. Second, and independently, to Facebook's
7 knowledge this Court has never permitted *simultaneous* fact and expert discovery in an antitrust
8 case.¹¹ And for good reason. The experts should have the benefit of the entire factual record
9 before submitting their opening reports. Proceeding with a highly-speculative class certification
10 exercise, complex fact discovery, and even more complex expert discovery (against an ever-
11 evolving record produced in simultaneous fact discovery) would create unworkable chaos.

12 Against this backdrop, and considering that Facebook intends to file two dispositive
13 motions, it makes little sense to set a schedule, as plaintiffs propose, contemplating a trial fewer
14 than two years from the filing of the first complaint in this case. Instead, if the Court is inclined
15 to set a trial date now, a more realistic and appropriate date is mid-2025 or 90-120 days after
16 final judgment is entered in the government cases, whichever is later. This will ensure that the
17 government cases go first (and thus the issues in this case can be narrowed, as Facebook has
18 explained above), and will give the parties adequate time to conduct class certification
19 proceedings, as well as appropriately structured fact and expert discovery. But again, the
20 uncertainty of the schedule in the government cases now militates against setting a further
21 schedule at this time and instead revisiting this topic once the schedule in the government cases
22 has been set.

23
24
25 ¹¹ See CMO at 2, *In re Xyrem (Sodium Oxybate) Antitrust Litig.*, 5:20-md-2966-LHK, ECF No.
26 44 (N.D. Cal. Jan. 28, 2021); CMO at 2, *In re Qualcomm Antitrust Litig.*, 5:17-md-2773-LHK,
27 ECF No. 36 (N.D. Cal. May 25, 2017); CMO at 1, *Ryan v. Microsoft Corp.*, 5:14-cv-4634-LHK,
28 ECF No. 46 (N.D. Cal. Feb. 11, 2015); CMO at 2, *Garrison v. Oracle Corp.*, 5:14-cv-4592-
LHK, ECF No. 25 (N.D. Cal. Jan. 21, 2015); CMO at 2, *In re Animation Workers Antitrust
Litig.*, 5:14-cv-4422-LHK, ECF No. 33 (N.D. Cal. Nov. 6, 2014); CMO at 2, *In re High-Tech
Employee Antitrust Litig.*, 5:11-cv-2509-LHK, ECF No. 88 (N.D. Cal. Oct. 26, 2011).

1 **18. Trial**

2 Consumer Class Plaintiffs' Statement: The Consumer Class Plaintiffs request a jury trial,
3 and currently estimate the trial in this case will take four weeks.

4 Advertiser Class Plaintiffs' Statement: The Advertiser Class Plaintiffs request a jury
5 trial, and currently estimate the trial in this case will take four weeks.

6 Facebook Statement: It is premature to estimate the duration of trial at this early date,
7 especially given the significant uncertainty as to the scope of this case and whether classes will
8 be certified. Facebook anticipates that the plaintiffs' request for damages will not survive
9 dispositive motion practice and therefore a jury trial will be inappropriate.

10 **19. Disclosure of Non-Party Interested Entities or Persons**

11 Consumer Class Plaintiffs' Statement: Consumer Class Plaintiffs are not aware of any
12 persons or entities with a financial or other interest in the subject matter in controversy other than
13 the named parties and members of the proposed class.

14 Advertiser Class Plaintiffs' Statement: All Advertiser Plaintiffs named in the *Affilious*
15 Complaint have filed their certifications pursuant to Civil L.R. 3-15; other than the named
16 parties, there are no non-party interested entities or persons to report. To the extent a plaintiff
17 that has not filed a Civil L.R. 3-15 certification is named in the consolidated complaint on behalf
18 of the advertiser class, such certification will be promptly filed.

19 Facebook's Statement: Facebook is not aware of any persons or entities with a financial
20 or other interest in the subject matter in controversy other than the named parties and the
21 members of the putative class.

22 **20. Professional Conduct**

23 All attorneys of record for the parties have reviewed the Guidelines for Professional
24 Conduct for the Northern District of California.

25 **21. Other Matters**

26 The parties believe that the following procedures will facilitate the expeditious,
27 economical, and just resolution of this action:
28

1 A complex antitrust class action presents special case management issues, in particular
2 the efficient and timely completion of discovery. Given the issues likely to arise in the course of
3 litigating this matter, the parties believe that the action would benefit from quarterly status
4 conferences in person or by telephone on dates and at times convenient for the Court. *See*
5 Manual for Complex Litigation, Fourth §11.22 (2004). To the extent status conferences are held
6 quarterly or at other intervals, the parties propose jointly filing a Status Conference Report seven
7 days in advance of a scheduled Status Conference setting forth what issues, if any, there are for
8 discussion with or resolution by the Court.

DATED: March 31, 2021

Respectfully submitted,

By /s/ Shana E. Scarlett

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SIGNATURE ATTESTATION

I am the ECF User whose identification and password are being used to file the foregoing. Pursuant to Civil Local Rule 5-1(i), I hereby attest that the other signatories have concurred in this filing.

Dated: March 31, 2021

By: /s/ Stephen A. Swedlow
Stephen A. Swedlow